possible to infer that at one time he had some sort of *animus possidendi*. There is, however, not a scrap of evidence, although he was called as a witness at the trial and examined and cross-examined, to shew a single act on his part that could by any stretch of the imagination be construed as an act of occupation and even his *animus*, if he ever had any, had clearly disappeared before the commencement of the proceedings for his attitude throughout, which has been completely passive, is quite irreconcilable with the continued existence of any intention to occupy the premises or make use of them in any way.

I am thus compelled to the conclusion that the Official Assignee did not remain in possession of the premises after the determination of his tenancy so as to bring him within the scope of section 15 of the Ordinance and that accordingly he was at no time a statutory tenant within the meaning of the section. The appeal, therefore, fails and must be dismissed with costs. If there is a deposit in Court it must be paid out to the respondent and set off against his taxed costs.

Before departing from the case I feel that although I am not specifically concerned with the point, I should say something about so much of the order made in the Sessions Court as relates to the sub-tenant Lal Singh. If this man came into occupation of the premises by virtue of a sub-tenancy created in his favour by anybody entitled to do so he will be entitled to the protection of the Control of Rent Ordinance but that raises a question which will have to be decided in proceedings to which he is a party.

Appeal dismissed

Solicitors: *S. Seenivasagam & Sons; Maxwell, Kenion, Cowdy & Jones.*

In re J. B. YOUNG, DECD.; J. C. WITT & ANOR. v. COLLECTOR OF ESTATE DUTY

[C. A. (Mathew C.J., Murray-Aynsley C.J., (S) and Bellamy J.) January 20, 1955]

[K. L. — F. M. Civil Appeal No. 11 of 1954]

Estate Duty Enactment, 1941 — Private limited company — Valuation of shares on death of shareholder.

The main question raised on this appeal was the value of the ordinary shares of Boustead & Co. Ltd., a private company registered in Malaya, on February 4, 1948 the date of the death of the deceased. At the trial the learned Judge fixed the value at $150. The appellant appealed against this finding.

Held: (1) in estimating the value of the share the Court must take into consideration every advantage and disadvantage to the company and every benefit and clog attaching to the shares as well as the nature of the particular company; (2) in the special circumstances of the private company in this case no normal investor would be prepared to pay more than $100 for a share and therefore the value to be placed on the shares for the purpose of estate duty should be $100.

Cases referred to:—

(1) *Smyth v. Revenue Commissioners* (1931) Ir. R. 643.

(2) *Attorney-General Ceylon v. Mackie* (1952) 2 All E.R. 775.

(3) *Inland Revenue Commissioners v. Crossman* (1937) A.C. 26.

(4) *Borland's Trustees v. Steel Brothers & Co.* (1901) 1 Ch. 279.

(5) *Attorney-General v. Jameson* (1905) 2 Ir. R. 218.

(6) *In re Holt* (1953) 1 W.L.R. 1488; (1953) 2 All E.R. 1499.

(7) *Re Hogg Decd.* (1939) M.L.J. 139; (1939) S.S.L.R. 9.

In addition to cases referred to, the following were also cited in argument: *Dale & Plant Ltd.* (1890) 43 Ch. D. 255; *Hickman & Kent* (1915) 1 Ch. 881; *Beattie v. Beattie* (1938) 1 Ch. 708; *In re New British Iron Co.* (1898) 1 Ch. 324; *In re Anglo Austrian Printing & Publishing Union* (1892) 2 Ch. 158; *Nell v. Atlanta Gold & Silver Consolidated Mines* 11 T.L.R. 407; *Salvesen's Trustees v. Commissioner of Inland Revenue* (1930) S.L.T. 387.

COURT OF APPEAL, from the decision of Wilson J. reported *sub nomine, In re Jasper Bertram Young, Decd.* (1954) M.L.J. 78.

A. F. Thorne (*Morris Edgar* with him) for the appellant: After dealing with the past history of Boustead & Co. Ltd. said that on February 11, 1947 the Company bought the London business and partnership was dissolved. On July 21, 1947 a new set of Articles of Association of the Company was adopted. The financial year of the Company was from the end of February to the end of February and the year here concerned with was the year from March 1, 1947 to February 29, 1948. J. B. Young died on February 4, 1948. Profit and loss account and balance sheet as on February 29, 1948 was the one it was agreed should count. At his death J. B. Young was the owner of 2,500 shares in the Company of a par value of $100. There was also his remuneration as director of the Company and "additional remuneration."

Counsel submitted that section 20 of the Estate Duty Enactment, 1941 applied, and as deceased was not in control of the Company, section 11 did not apply.

One of the principles in valuing was to see what shares had changed hands. No arrangement between directors that shares should pass as par value. He submitted that the learned Judge's approach to the case was incorrect, in that he accepted the valuation of Mr. Noble without critically examining the bases of valuation adopted by Mr. Phillips and Mr. Noble who arrived at two different conclusions. The question that the learned Judge had to ask was, what price these shares would fetch in the open market at the time of the death of the deceased. *In re Holt*[6] sets out principles to be followed in assessing valuation of shares.

F. G. Charlesworth for the respondent: Submitted that this was not an easy case. He referred to *Crossman case*[3] and *Hogg's case*[7]. One must assume that where there were restrictions on transfer of shares the purchaser would get on the register and that he would step into the shoes of the deceased i.e., that he would become a director. *Dymond on Death Duties*, 11th Edn. p. 234. Here you have a family business which developed into a company which resulted in the partners becoming directors, the directors being either members of the family or managers of branches in this country who were rewarded by a share in the profits of the company. What would a purchaser pay for slipping into the shoes of the deceased? He referred to the observations of Lord Blanesburgh in *Crossman's case*[3]. "It must be assumed that the property can be transferred to the hypothetical purchaser." He submitted that what one had to consider was what a purchaser would pay with the knowledge that he would be put on the register of shareholders. Profit originally was shared between the partners: the two Youngs held all the shares. In a company of this sort one had to envisage a purchaser of the shares who would be acceptable to the directors and who would expect to enjoy the profits of the company. *Smyth v. Revenue Commissioners*[1].

In cases where it was clear that the bulk of the profits of a private company was distributed to the directors, the primary consideration in assessing the value of the shares was the profit-earning capacity: *Dymond*, p. 244. In a case of this nature the value attached to the shares should have been based on the value of the tangible assets of the company, *Attorney-General Ceylon v. Mackie*[2].

A. F. Thorne replying stressed on the importance of yield. Had the Company got reserves? There was no foundation upon the suggestion that intending purchaser was to be acceptable to directors: shares might be sold in one lot or several lots. *Green* does not support the principle set out in *Dymond* — *Dymond's* proposition should be accepted with caution. *Mackie's case*[2] did not set out principle of valuation — where it was shown that shares could not be sold for more than tangible assets, then that was the basis of valuation. No value should be given to the factor that a purchaser could buy other shares because (1) quite unknown as to time, (2) fair value had to be made and purchaser was not going to get a bargain, (3) compete with other shareholders.

Cur. Adv. Vult.

Mathew C.J. (with whom **Bellamy J.** agreed): — The main question to be determined in this appeal is the value on 4th February, 1948, of the ordinary shares of Boustead and Company Limited, a private company registered in Malaya. The valuation put on the shares by the appellants is $100 and by the respondent $150. The learned trial judge found for the respondent and fixed the value at $150. The appeal is against this finding.

Evidence was given in the Court below in support of the valuation of $100 by Mr. Phillips, a senior partner of Turquand Young & Co., Chartered Accountants, Singapore, who had been personally connected with the accounts of Boustead & Co. since 1936. The valuation of $150 was put on the shares by Mr. Noble, Manager of Evatt & Co., Chartered Accountants, Kuala Lumpur. The learned trial judge accepted the valuation of Mr. Noble, and would appear to have been influenced by a statement made by him to the effect that he was generally in agreement with Mr. Phillips' principles of valuation and that his own valuation was on similar lines.

Mr. Thorne, for the appellants, has submitted that the learned trial judge's approach to the case was incorrect, in that he accepted the valuation of Mr. Noble without critically examining the bases of valuation adopted by Mr. Phillips and Mr. Noble who arrived at two different conclusions. The question that the learned trial judge had to ask was, what price these shares would fetch in the open market at the time of the death of the deceased.

Before Mr. Noble made his valuation, he consulted the legal advisers to the respondent and was advised that he was required to give his opinion as to the value the shares would fetch if sold in the open market by a willing vendor to a willing purchaser and that, so far as was possible, his valuation should be based on the income-earning prospects of the company, and should be the price which a prospective investor would be prepared to pay for the shares.

It is clear from Mr. Noble's evidence that when he made his valuation he had uppermost in his mind the

income-earning prospects of the company, and was not unduly concerned with article 81 of the articles of the company. Mr. Noble also appeared to think that a purchaser of a large block of shares could expect to find himself a director and would have a say in the distribution of the profits. It is, I think, clear from Mr. Noble's evidence that his valuation was based on estimated future of profits, part of which would be paid out as dividends and part kept in reserves which might come into the shareholders' hands by way of increased dividends or bonus issues of shares.

Mr. Phillips, on the other hand, considered that a prospective shareholder could not reasonably expect a return on his shares which exceeded five per cent. If he looked at the balance-sheet, he would be discouraged that the current assets and the liabilities were approximately equal, and that the current assets were not, as is usual, twice as much as current liabilities. He would be further discouraged when he read article 81, which deals with remuneration for directors, and article 30 which governs the transfer and transmission of shares. Familiar as he was for a number of years with the affairs of Boustead & Co., he could not value the shares at more than $100, the par value at which all transactions, admittedly mostly between directors, had taken place. Both Mr. Noble and Mr. Phillips agreed that a break-up value of the shares was $150.

Mr. Charlesworth, for the respondent, has laid considerable stress on the amount that was paid out by way of additional remuneration to the directors. The special position of the Directors of Boustead & Co., and the return which an ordinary shareholder might expect to receive are conveniently summarised in a letter from Turquand Young & Co., to the Directors of Boustead & Co., as follows:—

"In the capital structure of Boustead & Co. Ltd., the position of ordinary shareholders is very different from that of members of other companies. This is due to the peculiar circumstances of Boustead & Co. Ltd., whereby in effect, the original partnership is maintained although for practical purposes the partners are called Directors, and their share of divisible profits is obtained by way of additional remuneration under article 81. Thus the dividend on ordinary shares is equivalent to (and is envisaged to be) a fixed interest return on capital in a partnership. This return or dividend is not likely to be, and in fact cannot be much more than 5% apart from exceptional years. In respect of the year 1947/48, the ordinary shareholders received a dividend of 7½%."

The Directors of Boustead & Co. cannot properly be compared with the directors of other local firms which operate in Malaya and whose director's fees have been set out in exhibit 'E'. All the Directors of Boustead & Co. are full-time working directors, who either are members of the family or are managers who have worked in Malaya and have intimate knowledge of the business. They qualify for directorships on account of their business capacity and special knowledge of Boustead & Co's. business activities in Malaya, and not because their names would add glamour to the list of directors.

Mr. Charlesworth contends that this is a case where there is a wide discrepancy between the amount of the profits earned and the amount distributed as dividends. Accordingly, considerable regard must be paid to earnings rather than to dividends in valuing the shares. In support of this contention he cited *Smyth v. Revenue Commissioners*[1]. In that case the company was a family business with 30,000 shares of £1 each, of which 23,007 had been issued, 18,501 being held by the testator, 4,251 by his son and the remaining 255 by the family. The testator and his son were the managing-director and the assistant managing-director respectively. They drew £3,000 remuneration between them, and over a period of 6 years a dividend of 5.3% had been declared. The company was in a secure position. It was held that the figure of £3,000 per annum as remuneration of the two directors for such a business was out of all proportion to the value of the services or the nature of the business, and was such as no public company would pay. It was held further that the company could be fairly regarded as capable of earning on a commercial basis ten per cent. on its capital.

This case is by no means on all fours with the present, as there the testator had a majority shareholding. It was also held, which is a matter to be considered later, that the contention that the testator's shares would be most likely to be sold en bloc to a single purchaser, and their value should be fixed accordingly, was unsustainable, as the possibility of the shares being divided up among several purchasers, either members of the testator's family or of the father, must be considered. The purchasers of the shares of testator in the case just discussed would have had no difficulty in ensuring that their share of the profits in the company would be a reasonable and adequate return on the capital invested.

Another line of argument developed by Mr. Charlesworth was that in a case of this nature the value attached to the shares should have been based on the value of the tangible assets of the company, which in the present case is agreed at $150 by both accountants. He referred to the case of *Attorney-General of Ceylon v. Mackie*[2]. In that case no dividends on any shares had been paid for ten years, and at the date of the death of the testator the war was on, and the future of the trade in which he was concerned was unpredictable. This being so, the only method of valuation which could be adopted for the purpose of estate

duty would be the value based on the value of the tangible assets. This, again, was a case where the testator had a controlling interest.

There is a further submission that the purchaser of the testator's shares in Boustead & Co. could reasonably expect to become a director and would therefore have a share in the additional remuneration of directors. There are two points on this. First, as was held by Hanna J. in *Smyth v. Revenue Commissioners*[1], *supra*, it cannot be assumed that the shares will be bought by one purchaser en bloc and secondly, it would be contrary to the established practice of the Board to accept as a director anyone who was not familiar with the special business which the company carries on.

It appears to me that in this case there is little difficulty in applying the principles laid down in *Inland Revenue Commissioners v. Crossman*[3], where it was held:—

"That the value of the shares for the purpose of estate duty was to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered and to be regarded as the holder of the shares, and should take and hold them subject to the provisions of the articles of association, including those relating to the alienation and transfer of shares in the company."

We are dealing with the value of shares, and it is important in this connection to bear in mind what is the nature of a share, which has been so aptly described by Farwell J. in *Borland's Trustees v. Steel Brothers & Co.*[4]. It is as the learned judge states (at page 288):—

"The interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share."

The respondent is trying to import into the value of the shares other factors which, were they to exist, would have the effect of his deriving from the company monetary benefits over and above the customary five per cent. dividend.

In approaching this case, I would adopt the words of Hanna J. in *Smyth v. Revenue Commissioners*[1], *supra* at page 656:—

"In my opinion, in estimating the price, every advantage and disadvantage to the company, and every benefit and clog attaching to the shares, as well as the nature of the particular company, must be considered. According as the facts differ more weight will be given to one element than to another. You must consider the profit-earning capacity, the return for the purchaser's investment, the general solvency of the company, the extent of the security in the shape of assets, the nature of the management, the objects of the company, its method of business, the capital value of the assets of the company, the restrictions upon the transfer of the shares and the amount of liabilities. On some of these elements persons accustomed to value can place a relevant figure, but the test for some of the others is merely general business experience. In my judgment, the profit-earning capacity of the share is the most important item, and would be most prominent in the mind of the purchaser in this case. When I say 'profit-earning capacity' I mean profit-earning on a reasonable commercial basis for a company such as may be under consideration, not necessarily as appearing in the balance sheets, which may, for reasons of the proprietors, be prepared on a particular basis. But while that is in the foreground you must consider as a definite and well-marked background the capital value of the share. It may operate either to increase or decrease the price as the case may be." (The underlining is mine).

The prospective purchaser in that case could see from a study of the balance-sheet that his prospective holding could earn for him ten per cent., whereas in the present case he could have little hope of a return of more than five per cent.

Bearing in mind the following factors:—

(i) the special position of the shareholders;
(ii) the special provisions dealing with the transmission of shares;
(iii) the special provision of article 81 which, if fully implemented, would preclude transfers to reserve;
(iv) the unlikelihood of earning a dividend of more than five per cent; and
(v) the fact that assets and liabilities approximately balance;

I have come to the conclusion that no normal investor would be prepared to pay more than $100 for a share. In my view, the value to be placed on these shares for the purpose of estate duty should be $100.

As regards the cross-appeal, in my judgment it should fail. Apart from the question of whether the testator was entitled to and could sue successfully for an ascertained sum calculated under article 81, which I think he could not, the question of how much he should recover could only be ascertained by agreement amongst the directors. It is only in default of agreement that the testator would be entitled to one-twelfth. It is clear from the evidence taken on commission that the amount of additional remuneration to be paid to the directors was a matter of decision by the senior directors, which was never challenged. I agree with the learned trial judge's findings on this part of the case.

I would accordingly allow this appeal with costs here and below and dismiss the cross-appeal with costs. The deposit will be paid to the appellants.

Murray-Aynsley C.J. (S.) : —I have had the advantage of reading the judgment of the learned President with which I am in entire agreement and I have little to add. If the case is to be decided according to the rule enunciated in *Crossman's Case*[3] I think it is clear that $100 is the highest value that can be put upon the shares in the case of a minority holding. To arrive at a higher figure it is necessary to disregard the Articles of Association. In *Jameson's*

Case[3], Palles, C.B. considered that this should be done. Logically one should either regard the articles in their entirety or disregard them altogether. The Courts have, however, taken a less logical but more practical line intermediate between the two positions. Provisions in articles giving a large share of the profits to those responsible for "management" are not uncommon even in the case of public companies. Some years ago a single management share in a company operating in Singapore, of the nominal value of £1, had to be bought out for £100,000. I do not think that it would be reasonable to disregard the articles in these cases even if the question were still open.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Bannon & Bailey; Shearn, Delamore & Co.*

ONG PHAIK GAN (w) & ORS. v. CHO BENG SOH (w)

[O. C. J. (Wilson J.) May 16, 1955]

[Penang — Civil Suit No. 257 of 1954]

Landlord and Tenant — Trustees — Claim for possession of premises where family "Sin Choo" were housed — Occupier whether licensee or tenant — Sums described as rent may not be rent.

The plaintiffs in this case, as trustees, were owners of a family house. They claimed possession of the premises from the defendant. The defendant's husband, who had since died, occupied the house, and in consideration of his occupation it was his duty to clean and maintain the "Sin Choo" of the plaintiffs' family which were placed in the house. Further consideration of $20 per month was paid by the defendant's husband and, subsequently by the defendant for occupation for which receipts were issued by the plaintiffs every month and the sum was described therein as rent. The plaintiffs were always entitled to access to the house for the purposes of ancestral worship.

Held: (1) the defendant's husband was only a licensee; (2) the mere fact that sums were described as rent did not prove that they were rent if, in fact, they were not.

CLAIM for possession.

Eusoffe Abdoolcader for the plaintiffs.

Lim Ewe Hock for the defendant.

Cur. Adv. Vult.

Wilson J.: — The plaintiffs are, as trustees, the owners of a house No. 35, Noordin Street, Penang, and hold it as a family house upon and subject to the trust mentioned in the deed of trust. They claim possession of the premises from the defendant. The trust was created for a period of twenty-one years which expired on the 18th May, 1954, and they now wish to sell the premises with vacant possession. The defendant's husband went into occupation of the house in the year 1933. He died about five years ago and the defendant has remained in occupation ever since. On the 13th January 1954, the plaintiffs' solicitors, by letter, requested and required the defendant to quit and deliver up peaceful possession of the premises within one month.

The sole question for consideration in this case is whether or not the defendant's husband was a tenant or licensee of the premises. Either before he went into occupation or shortly afterwards the "Sin Choo" of the plaintiffs' family were placed in the house. It is quite clear that whether it was before or after, he was always aware of the fact that in consideration of his occupation it was his duty to clean and maintain the "Sin Choo". It is, of course, unfortunate that the defendant's husband is dead and that the defendant has no knowledge of the original transaction and depends entirely on what her deceased husband told her. The amount paid by the defendant's husband and, subsequently, the defendant for occupation was small. The case is complicated by the fact that receipts were issued every month in respect of the $20 paid per month and the $20 is described therein as rent. The mere fact that these sums are described as rent does not, of course, prove that they were rent if, in fact, they were not.

On the facts of the case I have come to the conclusion that the defendant's husband was only a licensee of the premises, and in these circumstances I find that it is immaterial that fresh receipts were issued in respect of what was described as rent after the notice to deliver up possession was given.

It is to be noted that I am satisfied that the plaintiffs, by whatever agreement they had with the defendant's husband, were entitled to access to the house for the purposes of ancestral worship at any time.

There must be judgment for the plaintiffs for the possession of No. 35, Noordin Street, Penang, and for mesne profits at $20 a month from the 1st June, 1954, until the date of possession, and for the costs of this action.

Claim allowed.

Solicitors: *Ong Huck Lim & Co.; Lim, Lim & Oon.*

KHOO TECK YAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) April 13, 1955]

[K. L. — Criminal Appeal No. 20 of 1955]

Road Traffic — Motor Vehicles Commercial Use Regulations, 1945, reg. 7 — Haulage permit for carriage of goods — Motor Vehicles Third Party Risks Regulations, 1946, reg. 3(1) and (2) — Burden of proof — Evidence Ordinance, 1950, s. 106.